BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDWARD LAVERENTZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,000,188
SEDGWICK COUNTY	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appealed the preliminary hearing Order dated January 8, 2002, entered by Administrative Law Judge Jon L. Frobish.

Issues

Claimant alleges he suffers binaural hearing loss from noise exposure at work from 1991 to the present. [1] The Administrative Law Judge (ALJ) granted claimant's request for preliminary hearing benefits and named Dr. Kubina as the authorized treating physician. Respondent contends this was error as claimant failed to prove accidental injury arising out of and in the course of his employment. Whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent is the only issue on this appeal.

Findings of Fact and Conclusions of Law

After reviewing the record compiled to date, the Appeals Board (Board) finds the ALJ's Order should be affirmed. The Board finds that claimant's hearing loss was caused or contributed to by his exposure to loud noises at work. Accordingly, his present need for medical treatment is directly related to an accidental injury or injuries that arose out of and in the course of his employment with respondent.

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[1] Claimant's form K-WC E-1 Application for Hearing and form K-WC E-3 Application for Preliminary Hearing.

1) Claimant is a 43 year old firefighter. He has worked for respondent 22 years. Claimant alleges his hearing loss is due to exposure to loud noise at work, including sirens, air horns, alarms, bells, fans, gas generators, diesel engines, water pumps, metal cutting tools and explosions.

2) Claimant is not aware of how long he has suffered from a loss of hearing. At the urging of his wife, claimant went to his family physician for a routine physical examination. As a part of that examination a hearing test was performed which disclosed some hearing loss.

3) Claimant was then referred by his family physician to a specialist, Glenn R. Kubina, M.D., on April 2, 2001. His assessment was "high frequency neurosensory hearing loss consistent with noise exposure."[2] Hearing aids were recommended. Respondent contends claimant has failed to carry his burden of proving that his hearing loss is more probably than not related to his exposure to noise during the course of his employment for the Sedgwick County Fire Department. Respondent points to claimant's exposure to noise during his off-work trade as a plumber and his hobby of hunting as potential contributing factors to his hearing loss. Conversely, claimant testified that his exposure to loud noises away from his work with respondent was less significant than his exposure at work.

4) The Workers Compensation Act places the burden of proof upon claimant to establish his or her right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[4] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[5]

5) To receive workers compensation benefits, the claimant must show a "personal injury by accident arising out of and in the course of employment."[6] The question of

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[2] Tr. of Prel. H., Claimant's Exhibit 1, page 2 (Jan. 8, 2002).

[3] K.S.A. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P2.d 871 (1984).

[4] K.S.A. 44-508(g). *See also* *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 44-501(g).

[6] K.S.A. 44-501(a); Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

whether there has been an accidental injury arising out of and in the course of employment is a question of fact.[7]

6) In Kindel v. Ferco Rental, Inc., 258 Kan. 272, 278, 899 P.2d 1058 (1995), the Supreme Court stated the general principles for determining whether a worker's injury arose out of and in the course of employment:

> The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et. seq.,* have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arise "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's services.

7) Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to each case.[8]

8) The phrase "arising out of" employment requires some causal connection between the injury and the employment.[9]

9) An accidental injury is compensable under the Workers Compensation Act even where the accident serves to aggravate a preexisting condition.[10] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[11]

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[7] Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 805, 909 P.2d 657 (1995).

[8] Newman v. Bennett, 212 Kan. 562, 568, 512 P.2d 497 (1973).

[9] Pinkston v. Rice Motor Co., 180 Kan. 295, 302, 303 P.2d 197 (1956).

[10] Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

[11] Woodward v. Beech Aircraft Corp, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

10) While Dr. Kubina attributed claimant's hearing loss to noise exposure, he did not say whether or not it was claimant's exposure to noise while working as a firefighter that caused or contributed to his impairment. However, expert medical opinion testimony is not required to prove the cause of an injury or the existence of a disability.[12] Considering both claimant's testimony and the medical records in evidence, the Board agrees with and affirms the ALJ's finding that claimant's hearing loss was caused, aggravated or accelerated by his exposure to loud noise at his work.

11) As provided by the Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing on the claim.[13]

WHEREFORE, it is the finding, decision, and order of the Board that the preliminary hearing Order entered by the Administrative Law Judge Jon L. Frobish, dated January 8, 2002, should be and is hereby, affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2002

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BOARD MEMBER

c: E. L. Lee Kinch, Attorney for Respondent
Robert R. Lee, Attorney for Claimant
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

[12] Webber, f/k/a Schwarzkopf v. Automotive Controls Corp., ___Kan. ___, 35 P.3d 788 (2001); Graff v. Trans World Airlines, 267 Kan. 854, 983 P.2d 258 (1999).

[13] K.S.A. 44-534a(a)(2).